TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 463

NEW STATE ICE COMPANY, APPELLANT,

vs.

ERNEST A. LIEBMANN

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

FILED OCTOBER 15, 1931

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IN UNITED STATES DISTRICT COURT, WESTERN OKLAHOMA

No. 1107. Equity

NEW STATE ICE COMPANY, a Corporation, Complainant,

vs.

ERNEST A. LIEBMANN, Defendant.

COMPLAINT—Filed Mar. 31, 1930

Comes now the above named complainant and, for its cause of action against the above named defendant, states:

(1) That it is a corporation duly organized and existing under the laws of the State of Delaware and a citizen of that State, having its principal place of business at Dover therein, and duly authorized to do business in the State of Oklahoma as a foreign corporation; that the defendant is a citizen of the State of Oklahoma residing at Oklahoma City therein; that this is a suit in equity arising under and involving the construction and application of the Constitution of the United States, and that the matter in controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars.

(2) That on April 7, 1925, the Legislature of the State of Oklahoma duly passed an act entitled: "An Act declaring the manufacture, sale and distribution of ice to be a public business, placing same under jurisdiction of the Corporation Commission; providing a license fee, and penalty for violation thereof," being Chapter 147 Session Laws of Oklahoma, 1925; that under the provisions of this act the manufacture, sale and distribution of ice is a public business and properties invested therein are public utilities, subject to regulation and control by the Corporation Commission of the State of Oklahoma; that no person, firm or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license or permit for such purpose from said Commission, and the manufacture, sale and distribution of

[fol. 3] ice by any person, firm or corporation within said State, without such license or permit, constitutes a misdemeanor. That Section 5 of this act provides:

"That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the affording of all reasonable conveniences, facilities, service, as it may impose as to the transportation and transmission companies."

(3) That complainant is engaged in the manufacture and sale of ice in Oklahoma City, Oklahoma, under and by virtue of a license or permit duly issued to it by said Commission pursuant to the terms and provisions of said act, and has fully complied with the terms and provisions of said act and the Rules and Regulations promulgated by said Commission thereunder; that said license or permit so issued to it by said Commission for the manufacture and sale of ice under the provisions of said act constitutes and is a franchise property right; that it has invested in the business of the manufacture and sale of ice in Oklahoma City, under said license or permit, a sum in excess of five hundred thousand dollars.

(4) That the defendant owns and is in the possession of Lots Twenty-two (22) to Twenty-four (24) inclusive, Block Thirty-two (32), South Central Schilling Addition to Oklahoma City, Oklahoma County, Oklahoma, and, on February 10, 1930, obtained a building permit from Oklahoma City to build and construct an ice plant thereon for the manufacture, sale and distribution of ice within Oklahoma City; that shortly thereafter, he commenced the building and construction of an ice plant upon said lots for the manufacture, sale and distribution of ice within said city, and is now in the process of the construction of said building upon said

lots for such purposes; that he has not made an application [fol. 4] to said Commission for a license or permit to engage in the manufacture, sale and distribution of ice in said City; that he does not intend to make such application, and will, on or about May 15, 1930, commence the business of the manufacture, sale and distribution of ice within said City without complying with said act, in competition with the complainant herein.

(5) That the defendant has no right to engage in the business of the manufacture, sale and distribution of ice within said city without first having obtained a license or permit from said Commission so to do; that such manufacture, sale and distribution of ice by him in said City, without having obtained a license or permit from said Commission, will injuriously affect the business, revenues and properties of the complainant invested in such business and deprive it of its property without due process of law; that unless he is restrained and enjoined by this Court he will commence the business of the manufacture, sale and distribution of ice within said City without complying with said act and in open violation thereof; that he, in the manufacture, sale, and distribution of ice, will cover and include the territory now served and being served by the complainant in the manufacture and sale of ice under its license or permit from said Commission; that under the facts and circumstances as set forth herein the complainant has no plain, adequate remedy at law and, unless this court issues an injunction restraining and enjoining said defendant from the unlawful manufacture, sale and distribution of ice within said City it will suffer irreparable injury and loss and it is therefore entitled to injunctive relief for the preservation of its properties and revenues invested in said business and committed to public service and use under and by virtue of the permit issued to it by said Commission under said act.

Wherefore, Complainant respectfully prays for judgment against said defendant as follows:

(1) That he, his agents, attorneys, servants and employees, and all persons acting by, through or under him, or them, be perpetually enjoined and restrained from the manufacture, sale and distribution of ice within Oklahoma City without first having obtained a license or permit from

the Corporation Commission of the State of Oklahoma, [fol. 5] under said act approved April 7, 1925, being Chapter 147 Session Laws of Oklahoma, 1925.

(2) That this court assign this cause for hearing on complainant's application for an interlocutory injunction and that upon said hearing this court issue its injunction preliminary until final hearing, and perpetual thereafter.

(3) That in the meantime a temporary restraining order be issued herein temporarily restraining and enjoining said defendant from the manufacture, sale and distribution of ice within Oklahoma City without first having obtained a license or permit from said Commission under said act.

(4) That upon the final hearing of this cause said preliminary injunction be made perpetual, and that the complainant have such other and further relief as it may be entitled, including a judgment for costs.

J. H. Everest, J. B. Dudley, Phil D. Brewer, Guy L. Andrews, Solicitors for Complainant. Everest, Dudley & Brewer, of Counsel.

Duly sworn to by Sidney L. Brutsche. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 19, 1930

Comes now the above named defendant, and for answer to the complaint of the complainant filed herein denies generally and specifically each and every and all the allegations in said complaint contained, except such thereof as are hereinafter expressly admitted:

1. Said defendant admits that said complainant is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and doing business in the State of Oklahoma; admits that said defendant is a citizen of the State of Oklahoma, residing in Oklahoma City in said county and state; admits that this is a suit in equity

arising under and involving the application of the Constitution of the United States, and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars.

2. Said defendant admits that on April 7, 1925 the Legislature of the State of Oklahoma passed an act entitled "An Act declaring the manufacture, sale and distribution of ice to be a public business; placing same under jurisdiction of the Corporation Commission, providing a license fee, and penalty for violation thereof" being Chapter 147 Session Laws of Oklahoma, 1925; admits that under the provisions of said act the manufacture, sale and distribution of ice is declared to be a public business, subject to regulation by the Corporation Commission of the State of Oklahoma; admits that said act provides that no person, firm or corporation shall be permitted to manufacture, sell or distribute ice within the State of Oklahoma without first having secured a license for such purpose from said Corporation Commission; and that by the provisions of said act the manufacture, sale and distribution of ice by any person, firm or corporation within said state, without such license, is made a misdemeanor and admits that Section 5 of said act is as stated in said complaint.

(3) Said defendant admits that said complainant is engaged in the manufacture of ice in Oklahoma City, Oklahoma, under a license or permit issued to it by the Corporation Commission of the State, but specifically denies that such license or permit constitutes a franchise property right, and denies that said complainant has a sum in excess [fol. 7] of Five Hundred Thousand Dollars invested in the business of the manufacture and sale of ice in said city.

4. Said defendant admits that he owns and is in possession of Lots Twenty-two (22) to Twenty-four (24) inclusive in Block Thirty-two (32) Schillings Addition to Oklahoma City, Oklahoma County, State of Oklahoma; that he has obtained a building permit from said city to build and construct an ice plant thereon; that he has commenced the building and construction of an ice plant upon said lots, and is now in the process of the construction of said building; admits that he has not made application to the Corporation Commission of the State of Oklahoma for a license

or permit to engage in the business of manufacturing and selling ice in said city, and that he does not intend to make such application, and admits that he will commence the business of the manufacture, sale and distribution of ice in said city, in competition with said complainant.

5. Said defendant specifically denies that he has no right to engage in the business of the manufacture, sale and distribution of ice within Oklahoma City, Oklahoma, and denies that the manufacture, sale and distribution of ice in said city, by him, will deprive said complainant of its property without due process of law.

6. Further answering herein, said defendant specifically denies that the business of the manufacture, sale and distribution of ice in the State of Oklahoma is in fact a public business and that the properties used therein are public utilities; denies that said complainant in manufacturing, selling and distributing ice in Oklahoma City, Oklahoma, is engaged in a public business, denies that the property of said complainant used in said business is a public utility, and said defendant further specifically denies that the Corporation Commission of the State of Oklahoma is vested with the power and authority and charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in the State of Oklahoma; denies that said Corporation Commission has power to fix rates, rules, charges and regulations to be observed by persons, firms or corporations engaged in the business of manufacturing, selling and distributing ice in said state, and denies that said Corporation Commission is vested with the power and [fol. 8] authority to enforce its orders against any person, firm or corporation engaged in the business of the manufacture, sale and distribution of ice, without first having secured a license or permit so to do.

7. Further answering herein, said defendant states and avers that said Chapter 147 Session Laws of Oklahoma of 1925 set out and referred to by complainant in its complaint herein, and entitled "An Act declaring the manufacture, sale and distribution of ice to be a public business; placing the same under jurisdiction of the Corporation Commission, providing a license fee, and penalty for violation hereof" approved April 7, 1925, by which it is pro-

vided that no person, firm or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission, and that said Corporation Commission shall not issue a license to any person, firm or corporation for the manufacture, sale and distribution of ice, except upon a hearing had, at which the necessity for the manufacture, sale and distribution of ice at the point, community or place desired, and providing: "If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community, or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant (sic) for said license," and providing that any person, firm or corporation who shall engage in said business without first obtaining the license required shall be guilty of a misdemeanor and be punishable by a fine of not to exceed Twenty-five Dollars, and each day's violation shall constitute a separate offense, and providing further that the Corporation Commission may impose an additional fine of Five Hundred Dollars ($500.00) for each of said violations, is in violation of the rights guaranteed to said defendant and protected under and by virtue of the Constitution of the United States and particularly Section Ten of Article One, which protects contracts against impairment, and the Fourteenth Amendment to said Constitution prohibiting any state from depriving any person of life, liberty or property without due process of law, and prohibiting any state from passing any law denying to any person within its jurisdic-[fol. 9] tion the equal protection of the laws. Defendant states that he is the owner of the real estate hereinbefore described; that he has constructed a substantial building thereon to be used for the purpose of manufacturing ice therein, and has purchased all necessary machinery, and that he has expended the sum of about Forty Thousand Dollars therefor; that if he is prevented by the order of this court from using said property in the business of the manufacture, sale and distribution of ice, he will be deprived of his property without due process of law, in violation of the aforesaid provisions of the Constitution of the United States, and will suffer great and irreparable injury.

8. Defendant further states that the manufacture, sale and distribution of ice is not in fact a public business, and the properties employed in such business are not public utilities; that the State of Oklahoma is without power or authority to require a person, firm or corporation to secure a license or permit from the Corporation Commission of said state before engaging in such business, and said Corporation Commission is without power or authority to prohibit any person, firm or corporation from engaging in said business, or to punish by fine any person, firm or corporation for carrying on said business without first having obtained a license or permit so to do. Defendant further states that the business of the manufacture, sale and distribution of ice is a private business and not clothed with a public interest; that such business is not carried on under the authority of a public grant, or franchise and does not render a public service; that said business does not exercise the right, and has not the power, of eminent domain, nor does it require the use of the streets and highways in any manner not used by the public at large; that such business is not injurious to the public health, safety or morals, but is a useful and necessary occupation; that ice is manufactured or sold in practically every city, town and community in the State of Oklahoma by sundry persons, firms and corporations; and that such business is not and has not been conducted in restraint of trade, and said business is not a monopoly.

9. Defendant further states and avers that the complainant is not engaged in the sale and distribution of ice to the public in Oklahoma City, State of Oklahoma; that all ice sold and distributed to the consumers in said city is sold and [fol. 10] distributed by the Oklahoma City Ice Company, a corporation, and that said complainant should not be permitted to maintain this suit.

10. Defendant further avers that said Chapter 147 Session Laws of Oklahoma, 1925, was enacted through the influence of and for the benefit of said complainant and other large ice manufacturing interests, in order to prevent competition in their business, and that said law is being administered solely in the interest of said complainant and other large ice manufacturing interests, by prohibiting

other citizens of the state from manufacturing, selling and distributing ice in competition with complainant and said others. That said act was not enacted as a police regulation to protect the health, safety, morals and welfare of the citizens of the state, and is not being administered as such.

11. Defendant further states that the complainant herein is without equity and said complainant is not entitled to the relief prayed for.

Wherefore said defendant prays that said complainant take nothing herein, and for judgment against said complainant, adjudging and decreeing Chapter 147 Sessions Laws of Oklahoma, 1925, unconstitutional, inoperative and void; for costs of suit, and for such other and further relief as the court shall deem just and equitable.

Geo. M. Nicholson, Solicitor for Defendant.

[File endorsement omitted.]

Duly sworn to by Ernest A. Liebmann. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

MEMORANDA OF DECISION ON MERITS OF THE CONTROVERSY—Filed June 24, 1930

The facts are the defendant sought to engage in the business of manufacturing and the distribution of ice in the city of Oklahoma City. In pursuance of this purpose he purchased a site and entered upon the construction of buildings suitable to house the machinery and appliances necessary to the proper conduct of this business. However, before he could complete his building, install his machinery and equipment necessary for the conduct of his business the complainant ice companies engaged in the business of manufacturing and selling ice in the city of Oklahoma City, and having, as shown by the proofs, practically a monopoly of that business in that city, brought the two above entitled and numbered suits for the purpose [fol. 12] of enjoining defendant from engaging in the manufacture and sale of ice in said city. The cases are

in legal effect and purpose sought the same; were tried and submitted together as one suit and will be so determined.

The alleged ground on which the injunctions are sought is that defendant has not applied to the Corporation Commission of the state of Oklahoma, paid the fee exacted and obtained a license for the erection and operation of his plant in said city as it is contended he must do before he can lawfully engage in the manufacture and sale of ice in the state of Oklahoma. While this is the alleged ground on which the complainants predicate their right to the injunctive relief sought, yet I have no hesitancy whatever in stating the true reason for the bringing of these suits is that plaintiffs may further their practical monopoly of the ice business in said city, because they did not invite and do not welcome from defendant competition in their business whether the same be beneficial to purchasers of ice dealing with them or not. While the legislation of the state, presently to be considered, relied upon by complainants, is a part of the anti-trust and anti-monopoly laws of the state, yet no person could hear and consider the proofs in these cases, as I did, and reach any conclusion but that such legislation in actual practice and operation tends of necessity to the creation and perpetuation of monopolies and to the destruction of all competition in the manufacture and sale of ice to consumers. However this may be, the question presented in these suits in this:

In the year 1925 the legislature passed an act entitled:

"An Act declaring the manufacture, sale and distribution of ice to be a public business, placing same under jurisdiction of the Corporation Commission; providing a license fee, and penalty for violation hereof."

This act of the legislature referred to is Chapter 147 Session Laws 1925, as follows:

"Be it Enacted by the People of the State of Oklahoma:

"Ice—Manufacture and Distribution

"Section 1. That the manufacture, sale and distribution of ice within the State of Oklahoma is hereby declared to [fol. 13] be a public business, as defined by Sec. 11032, of the Compiled Statutes of Oklahoma.

"Corporation Commission—License

"Section 2. That no person, persons or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission of the State of Oklahoma. The license fee hereunder shall be the sum of fifty cents (50¢) per ton, per annum, of the daily capacity of ice manufactured, sold or delivered, but the minimum license shall be five dollars ($5.00).

"Section 7. Any person, firm or corporation who shall engage in the business of manufacturing, selling and distributing ice or engage in either of said businesses, without first obtaining a license, provided for herein, shall be guilty of a misdemeanor and any such person shall be punishable by a fine not to exceed twenty-five dollars ($25.00), and each day's violation shall constitute a separate offense; provided, the Corporation Commission is hereby authorized to promulgate general orders not in conflict with this Act, and to enforce such orders against any person, firm or corporation, manufacturing, selling or distributing ice or engaging in either of said businesses, by imposing a fine for the violation thereof not to exceed five hundred dollars for each of said violations."

Now, Section 11032 of the laws of Oklahoma referred to in section one above quoted, reads, as follows:

"Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or ordered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or [fol. 14] by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render

its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

Now, it will be noted the Supreme Court of the state of Oklahoma in Oklahoma Gin Company v. State, 63 Okla. 10; 158 Pac. 629, holds section 11032 was *construed* by the Supreme Court of the state as including only those businesses so conducted as to violate the provisions of section 11017 Compiled Laws of Oklahoma. Section 11017 of the Compiled Laws of that state reads:

"Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

In Shawnee Gas & Elec. Co. v. Corporation Commission, 35 Okla.; 454 Pac. 127, quoting approvingly from an unpublished opinion of Hayes, Justice, said:

" 'This section provides that whenever a business shall have certain characteristics, it shall be a public business, and shall be subject to the jurisdiction of the Corporation Commission to regulate its practices, rates, and prices; but it does not provide that all public business shall be subject in these respects to such jurisdiction. * * * The first part of said section attempts to define the class of business which the latter part of the section subjects to the jurisdiction of the Corporation Commission and the district courts. It appears to us clear that what was intended was to bring within the jurisdiction of the Commission the regulation of charges and rates for services connected with those businesses that violate the Acts and are connected, not with business strictly of a public character, such as common carriage, supply of water and gas, but with that class of business in which the owners, without any intent of public service, have placed their property in such a position that the public has an interest in its use. The distinction between the class of business and [fol. 15] its service intended to be defined by and included in said section and the business and service of public corporations, is we think, well made by Mr. Justice Brewer,

who delivered the opinion of the court in Cotting v. Goddard, 183 U. S. 72, 22 Sup. Ct. 30, 46 L. ed. 92, in the following language: "In the one (referring to property devoted to public service) the owner has intentionally devoted his property to the discharge of a public service. In the other, he has placed his property in such a position that willingly, or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interest require." It was this second class of business with which we think Section 13 was dealing and intended to place under the jurisdiction of the Corporation Commission and the district courts of the State as to all practices, rates and charges. * * * The Act confers not only upon the Corporation Commission jurisdiction to prescribe rates and charges under the conditions therein named, but confers also a like concurrent power upon the district courts of the State.'".

So limited as was done in this case by the Supreme Court of Oklahoma there can be no possible objection to this legislation under consideration. But, if we treat this legislation as broadly declaring all manufacturing and distribution of ice plants to be public utilities because so declared by the law making power of the state, and this is the contention made by complainants in these cases, far different and far more difficult questions arise. The question then presented arises over the power of the law making branch of the state, regardless of the circumstances and conditions, but its mere ipse dixit to make all ice manufacturing plants public utilities, conducting a public business, entirely at the beck and call of the Corporation Commission of the state. I cannot agree with this position and for the following reasons.

[fol. 16] The law making body of the state or nation does not possess the power to make a thing in name what in

fact and its essential nature it is not. It has often been declared in decisions controlling here, a state by its legislation has not the power of declaring a business to be a public utility or a business affected with a public use, and thus controllable, as seen fit, by the law making power which in its true nature is not such a business. Thus, in the case of Lawton v. Steele, 152 U. S. 135, Mr. Justice Brown, delivering the opinion for the court, said:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In Wolff Co. v. Industrial Court, 262 U. S. 522, Mr. Chief Justice Taft, delivering the opinion for the court, said:

"It is urged upon us that the declaration of the legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise." (Citing several cases.) "These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices. * * * "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early [fol. 17] common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but now-

adays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances. * * *

"It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation, is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

[fol. 18] In Tyson & Brother v. Banton 273 U. S. 418, Mr. Justice Sutherland, delivering the opinion for the court, said:

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowing as strictly denoting 'a right', that synonym more nearly than any other expresses the sense in which it is to be understood. * * *

"And, finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry."

In Fairmont Co. v. Minnesota, 274 U. S. 1, Mr. Justice McReynolds, delivering the opinion for the court, said:

"The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil-highbidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Quoting from Adams v. Tanner, 244 U. S., 590, the court continues:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no [fol. 19] profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found

quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

From the foregoing cases controlling here, if complainants contend the law making power and declared an ice manufacturing plant and the distribution of ice therefrom within the territorial limits of the state of Oklahoma, (in the light of other statutory enactments heretofore alluded to) is a public utility, and they further contend such declaration is binding and conclusive regardless of the true nature of the business conducted, such contention must be denied. On the contrary, it must be held whether an ice manufacturing plant and the distribution of ice therefrom is a public utility business, is a question of law for the court, and if it be a public utility in a certain sense, the nature and the extent of the regulation imposed, whether reasonable and necessary or unreasonable and arbitrary, under all the facts and circumstances of the case, is further a question of law for the court. Now, under the proofs in the instant cases it is clearly shown the act of the legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice. It further appears the act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated. While it is shown there are more ice plants engaged in the business of manufacturing and distributing ice in Oklahoma City than there were at the date the statute was enacted, yet while there are more plants there are less owners of these plants. Again, while it does not appear from the proofs in these cases that the true motive and intent of these suits is to obtain an injunction decree against the defendant because the operation of his plant will bring [fol. 20] competition with complainants, yet, judging the complaints by the same rules we judge ordinary business

corporations it must be true complainants would not invite the competition the operation of defendant's plants will bring them. It must be true some reasonable competition in the manufacture and distribution of ice in Oklahoma City will result to the benefit and not the detriment of the population of that city. The manufacture and sale of a commodity such as ice is a useful and honorable private business and calling in which any citizen so disposed has the undoubted right under our Constitution and laws to engage by investing his capital and selling his time and energy, at any time, and in any suitable and convenient place his judgment may dictate to him. If he builds up a monopoly and his charges for his product become excessive or exorbitant and he is not induced to reduce them by competition, I have no doubt as to the power of the state to correct such abuses, but such is not the power of regulation attempted to here be imposed. In these cases defendant has devoted his money to the purpose of the construction and operation of an honest, legitimate, personal manufacturing business in Oklahoma City, a project one would believe any such young, industrious, wide-awake growing city as Oklahoma City would welcome with outstretched arms and glad hearts. In attempting this business, at the very threshold of his endeavor complainants arise and inform him he may not engage in his chosen occupation in Oklahoma City unless and until he makes his application to the Corporation Commission of the state and pays for and procures permission in the shape of a license from that body to engage in such personal business within the state, no matter whether the people of the city much desire this new enterprise to be conducted in their city or not. Now, the very power that requires defendant to petition the Corporation Commission of the state to grant him a permit in the shape of a license to conduct this business, embodies the power, if such license is lawfully required, to forever exclude him from the conduct of such business. Not only that, if he has the hardihood to proceed without the license, to subject him to extreme fines and penalties as a law breaker. To my mind, to uphold such legislation in cases of this character, brought and conducted from the indisputable motives, and under all the facts and circumstances of these cases, would be as said [fol. 21] by the great and wise jurist, Mr. Justice Bradley,

"This will be running the public interest argument into the ground." And, as said by Mr. Chief Justice Taft "It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

It follows to my mind, the bills of complaint are without equity and must be dismissed for that reason.

It is so ordered.

John C. Pollock, U. S. District Judge.

June 23rd, 1930.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE—Filed June 24, 1930

On this the 22nd day of May, 1930, the above entitled cause comes on for trial on its regular order pursuant to assignment, was tried, submitted and taken under advisement.

On June 24th, 1930, the court, on further and final consideration of the pleadings, the evidence introduced and stipulations made by the parties, finds the issues in favor of the defendant and against the complainant; that the Act of the Legislature of the State of Oklahoma, of April 7, 1925, being Chapter 147 Session Laws of Oklahoma 1925, is unconstitutional and void, and that the complaint of the complainant is without equity and should be dismissed with prejudice.

It is Therefore Considered, Ordered, Adjudged and Decreed by the court that complainant's bill of complaint be, and the same hereby is, dismissed, with prejudice, and that the defendant have judgment against it for cost.

To all of which the complainant excepts and exceptions are by the court allowed.

John C. Pollock, Judge.

O. K.

Everest, Dudley & Brewer, Andrews & Aston, Rainey, Flynn, Green & Anderson, Solicitors for Complainant; Geo. M. Nicholson, Owen & Looney, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 22]. In United States District Court

Statement of Evidence under Subdivision (B), Equity Rule 75—Filed Nov. 13, 1930

The following is complainant-appellant's condensed statement, in narrative form, of the evidence introduced upon the trial, made in pursuance of Subdivision (b) Equity Rule 75, and lodged in the Clerk's office for examination of the defendant, as provided by said Rule.

The court held the burden was upon the defendant and he thereupon introduced the following evidence, and rested:

Evidence of Defendant

The defendant, Ernest A. Liebmann, (p. 3) testified that he was a resident of the State of Oklahoma; had been such for 41 years; had been engaged in the ice business since 1903 in Oklahoma and Texas; that in 1903 he was engaged in the ice business in Hobart, Sulphur and Oklahoma City; that at the time the present ice law was passed he had a plant in Oklahoma City; there were eight plants in the city then; the plaintiff, New State Ice Company, was one of them; that he knew of no agreement among the companies to manufacture and sell ice at a certain price prior to the passage of the act; that eight of the plants in the city were owned by six companies; that there are eleven in Oklahoma City now; they are owned by three companies; the price of ice prior to the passage of the act was hard to fix; there were different classes of trade; different prices; that prior to passage of the Act witness sold for 60¢ cash delivered; 57½¢ per hundred where they took coupons; and 40¢ per hundred at the dock; sold to dairymen for 30¢; that companies in Oklahoma City were generally along that line in price, but there was no agreement; cash trade delivery in Oklahoma City now was practically the same price as before; coupon books are 55¢ per hundred in place of 57½¢; dock prices are the same, except out-lying towns that are selling now for 50¢; country town delivery and dairy delivery are now 35¢; some factories have recently raised their dock prices from 35¢ to 40¢ per hundred pounds; that the plant he had built would be called somewhere between 25 tons and 30 tons; that he had spent

approximately $40,000.00 in building it; did not know just the date of the lawsuit; that he was ready to operate the [fol. 23] 1st of May,—used two men in operation—one day and one night man; that it did not require any unusual skill in a modern raw water electrically driven plant to operate it; that in distribution of ice between 30 and 40% is sold at the docks in 12-25-50 and 100 pound chunks; they drive up and get it; other ice hauled out in wagons and trucks; they put the streets to no greater use than any one else; that ice can now be manufactured cheaper than it could in 1925; electric power has been reduced some; equipment is simpler to operate; you can handle more ice with an electric hoist than before; ice business is merely manufacturing and selling a product; witness could see no difference to the general business than from a butcher or grocer or baker; that ice would stand shipping in a refrigerator car considerable distance—100 or 125 miles if it is loaded just ahead of the train that moves it; freight rates on ice are from 8¢ to 10¢ per hundred pounds on distances of 50 or 60 miles; there is considerable trucking of ice from one place to another; a privately owned mechanical refrigerator uses a different refrigerant than witness—they used sulphur-dioxide; that there is no material difference between a commercial ice plant and a home refrigerating plant; that the principle is the same, and both are simple in their construction and operation; that there were a good many individual ice plants in Oklahoma City and other cities of the state; that hotels, restaurants, meat markets and hospitals often have their own plants; lots of dairymen do.

Cross-examination:

On cross-examination witness testified that he did not believe as many hotels and large buildings had individual light plants or water plants as had ice plants; that witness had testified solely in regard to conditions in Oklahoma City; he could not say whether there were more than 6 competitive points in the entire State of Oklahoma so far as regards the manufacture and sale of ice in 1925; that he did not believe there were as many as one-third (⅓) of the ice plants in the State of Oklahoma, in 1925, owned by the electric power companies; that in his judgment $1500.00 a ton capacity would erect a raw water ice plant;

that there was not much difference in the price of ice equipment now and the price prevailing in 1925; that he started making ice in Oklahoma City in April, 1925; the other points he had been in were Hobart and Sulphur; the [fol. 24] restrictions on prices in such places as this were another man might ship in ice or put up another plant; that you could ship ice a distance of 50 or 75 miles in a car, put it in cold storage and compete with the man on the ground; of course, it was not practical to do it, but it could be done; the distance that ice could be carried in a truck and delivered would depend on the roads and the season of the year; with ice overweight 10%, by carefully covering it, it could be delivered to customers over a period of three or fours hours before melting so that a customer would lose no weight; prior to 1925 some ice men sent out scored ice; some did not; he did not recall any place where there was any material difference in the price of ice in competitive points prior to 1925.

O. W. Bartell (p. 24) called by the defendant testified that he was engaged in the dairy business three miles East of the Capitol building on 23rd Street; that he bought ice prior to 1925 at 25¢ per hundred pounds at the docks; the ice companies deliver it at his door at present for 40¢ per hundred; that he knew nothing of any agreement prior to June, 1925 as to prices among ice manufacturers; formerly he bought at the docks where he could buy cheapest; that there were probably three plants soliciting his business in 1925; that he did now know the Corporation Commission was regulating the price of ice in Oklahoma City prior to 1925.

Defendant thereupon introduced T. F. Hurt (p. 28), who testified that he lived at No. 1608 West 35th Street in Oklahoma City, Oklahoma, and was in business at No. 420 West Grand Avenue; had been a dairyman about 20 years; prior to June, 1925, he paid $4.00 a ton for ice at the docks from the New State, the Crystal and the Big Four plants; at present he made his own ice; he started making his own ice because the price was raised from $4.00 to $7.00 a ton after this law went into effect.

R. D. DAVIS was introduced as a witness (p. 30); stated he was a Ford dealer in Bethany, Oklahoma; had been in the ice business in '24 and '25 maybe; that he did not manufacture ice but bought ice from Mr. Liebmann and the New State Ice Company in Oklahoma City; prior to [fol. 25] the passage of the Act of June, 1925, he paid 30¢ a hundred at the docks; that the next Spring he paid 35¢ a hundred; that at present ice in Bethany, Okla., sold for 60¢ a hundred delivered and 50¢ at the docks.

Cross-examination:

On cross-examination testified that he did not know the Corporation Commission fixed the price of ice prior to 1925; that the price in Bethany in 1924 was 60¢ delivered; that he sold out to Mr. Anderson.

JOE BRASIER (p. 35) was thereupon called by the defendant. He testified that he lived at 428 Southwest Eleventh St., in Oklahoma City; that his business was salvaging old cars; that from 1910 to 1928 he was in the ice business buying wholesale and retailing to customers; that prior to June, 1925, he paid 25¢ a hundred for ice at the manufacturers' docks, and bought from the Big Four, the Crystal Ice and Ice Cream Company, and New State; that after June, 1925, he paid 35¢ a hundred.

S. B. FARNHAM (p. 37) was thereupon called. He testified that he had been in the ice business for 15 years in Iowa; from his experience he thought ice could be shipped from 50 to 75 miles in a good, tight, refrigerator car; was not acquainted with conditions in Oklahoma; could not see any material difference between manufacturing and selling ice and the preparation and sale of meat, or the baking and selling of bread; that nothing was used in the manufacture of ice that was injurious to public health; knew nothing about the business that was injurious to the public welfare or morals; did not require expert skill to operate an ice plant; a man of average intelligence can learn to operate a plant; (Cross-Examination) that he had applied to the

Corporation Commission to install an eighteen ton plant; that he never did ship ice 50 miles by freight, handle it twice, put it in cold storage and sell it in competition with a man manufacturing ice in the town.

GEORGE WINCHELL (p. 41) called by the defendant, testified that he had lived in Oklahoma City for 10 years; was em- [fol. 26] ployed by Sherman Machine & Iron Works as refrigerating engineer; that his employers were agents for ice making or refrigerating machines; that the process of manufacturing ice was chilling water to freezing point, and some system of agitation, in the case of raw water, to make it freeze clear; that there was nothing in the machinery or in any ingredient placed in the water that was injurious to the public health; that there was a slight decrease in the price of ice manufacturing machinery since 1925, but the machines had been simplified; that many big establishments manufactured their own ice; that he could see but little difference between the sale and delivery of ice and other manufactured products—for instance, meat might spoil; ice just melts.

Cross-examination:

On cross-examination he testified that his concern manufactured any kind of cast iron products, and were agents for ice machinery of the Frick Company of Waynesburg, Pa.; that the Frick Company sold the defendant Liebmann his plant; that ice is largely used to preserve food products; did not know the extent that ice was used in the State to preserve perishable foods and things of that nature.

OFFER IN EVIDENCE

Thereupon the defendant offered certified copy of the license issued to complainant by the Corporation Commission, which is in words and figures as follows:

"Duplicate

(Great Seal of the State of Oklahoma)

No. 736

State of Oklahoma, Corporation Commission

Ice License

Manufacture, Sale and Distribution

Know all men by these presents that Southwest Utility Ice Company of Oklahoma City, a corporation, having filed application for license to manufacture, distribute, and sell ice in the State of Oklahoma at Oklahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1925.

That said Southwest Utility Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Okla- [fol. 27] homa, at Oklahoma City, from July 1, 1929, to June 30, 1930, inclusive.

In witness whereof the Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary and its seal affixed thereto, this the 20th day of July, 1929.

Corporation Commission, C. C. Childers, Chairman.

Attest: E. D. Hicks, Jr., Secretary."

DEMURRER

Complainant interposed a demurrer to the evidence introduced by the defendant, and the court reserved ruling thereon.

The complainant introduced the following evidence and rested.

EVIDENCE OF COMPLAINANT

The plaintiffs then called as their witness W. P. HILL (p. 52) who testified that he was engaged in ice manufacturing; had been connected with the industry eleven years; that since the Fall of 1919 he had been Secretary of the Oklahoma Ice Manufacturers Association, and was acquainted

with the conditions pertaining to the industry prior to June, 1925; that as Secretary of the Association, and prior to June, 1925, they were having many complaints as to abuses in the industry from different communities all over the State; that the Ice Manufacturers Association had organized to attempt to correct that condition; numerous complaints had been filed before the Corporation Commission and hearings had; many of the complaints were informal; in 1921 the Corporation Commission cited every ice manufacturer in the state to appear and show causes why its practices should not be regulated by the Commission; that from 1919 until the date of the passage of the present ice law, practically the sole function of the secretary of the association was to investigate these complaints and try to adjust them with the complainant and the local manufacturer; that the nature of this abuse was largely discrimination in service, insufficient weight and a great many complaints as to prices; that the Corporation Commission began to exercise jurisdiction over prices prevalent in vari-
[fol. 28] ous communities long before the passage of the present act and prior to 1919; there was in effect in 1911 a general order, identified by witness as Exhibit One, and afterward in 1921 there were various other orders made for the purpose of correcting abuses existing in the industry in the way of short weights and so forth; nearly all of the time of witness was given in an effort to correct these abuses during the season in which ice was sold; the matters before the Commission were usually set down for hearing on Tuesday of each week; the witness would ordinarily spend that day in his office and before the Commission, and the balance of the week would be out in the communities trying to adjust complaints; that witness continued to act as secretary of the association since the passage of the Act of 1925; a general order governing the ice industry was issued by the Corporation Commission of the State after this bill became effective; that in 1921 a general order had been issued that was identified as plaintiffs' Exhibit Two, which was order numbered by the Commission No. 1906; this order was appealed by the ice companies that were resisting any attempt to regulate them; supersedeas was allowed in the appeal taken; the Supreme Court sustained the Commission in the case that is reported in 96 Oklahoma

Reports, page 19; Exhibits One and Two referred to by witness are as follows:

PLAINTIFFS' EXHIBIT 1

"BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause No. 1397. Order No. 505

In the Matter of Proposed Order No. 94 to the Moss BREWING COMPANY, NEW STATE BREWING ASSOCIATION, OKLAHOMA CITY ICE & COLD STORAGE COMPANY, PEOPLES ICE & FUEL COMPANY, WESTERN ICE COMPANY, CENTER FREEZE ICE COMPANY, CRYSTAL ICE COMPANY, STEFFENS & BRETCH ICE & ICE CREAM COMPANY

The proposed Order herein was issued for the purpose of requiring all parties delivering ice in Oklahoma City to secure a permit from the Corporation Commission before any manufacturer or ice producer can sell or deliver ice to such parties for local distribution in Oklahoma City.

At the hearing most of the ice companies above mentioned [fol. 29] were represented. No objections being offered to the proposed Order, the Final Order is hereby issued.

It is ordered that the Moss Brewing Company, the New State Brewing Asso., the Oklahoma City Ice & Cold Storage Co., the Center Freeze Co., the Crystal Ice Co. and Steffens & Bretch Ice and Ice Cream Company shall not deliver ice to any person to be delivered for local consumption in Oklahoma City who shall not have a permit issued by the Corporation Commission to such person.

That permits authorizing any person to deliver ice locally in Oklahoma City shall be issued without charge to any one that may apply. The only qualification for such permit is honesty. This will be presumed by the Commission until the contrary is shown by the holder of such permit in delivering ice.

Such permits are subject to be revoked by the Commission upon the holder thereof wilfully delivering a less quantity of ice to consumers than the amount paid for, that is approximately less—a variation of two or three pounds either way on a 25 pound block; three or four pounds on a

50 pound block; or four or five pounds on an 100 pound block will not be considered a violation of this Order.

That said permits may also be revoked by the Holder thereof wilfully tearing from coupon books more coupons than the amount of ice delivered.

No ice manufacturer or distributor in Oklahoma City shall employ any person to deliver ice directly or indirectly to any person for distribution who has one in their employ delivering ice that does not have a permit above described.

That in the event a permit is revoked, or an employe resigns, or it is necessary to hire new men, the ice company may employ any person not heretofore having had a permit for forty-eight hours; that such person within such period of forty-eight hours must apply to the Commission for a permit.

That each manufacturer or dealer in ice must supply all men delivering ice for them with a badge, the number thereon to correspond with the number of the permit held by such parties.

Each wagon shall be supplied with a pair of accurate [fol. 30] scales and upon the request of any consumer, the ice must be weighed, and the amount thereof reported to the purchaser.

This order shall be in full force and effect on and after the 6th day of August. 1911.

Oklahoma City, Oklahoma, July 27th, 1911."

PLAINTIFF'S EXHIBIT 2

"Order No. 1906. Cause No, 4299

To all persons, firms, associations or corporations engaged in the business of manufacturing, selling or furnishing ice, directly or indirectly, to the public in the State of Oklahoma, and to any and all persons concerned in proposed Order No. 170:

Finding of Fact, Opinion, and Order

In accordance with notice dated June 18, 1921, and published according to law, hearing on Proposed Order No. 170 was held at the office of the Corporation Commission in the State Capitol at Oklahoma City, Oklahoma, on July 13, 1921. There was a general representation of ice manufacturers

and dealers representing all parts of the State of Oklahoma. It was stated in support of the rules proposed to be promulgated that each of said rules and regulations was proposed for the reason that the wrongful practice or failure of good service sought to be corrected thereby had occurred within the State of Oklahoma and had been made the subject of formal or informal complaint to the Commission.

The attorneys for the respondent ice manufacturers and dealers were unanimous in their insistence that the record show their objection to the assuming of jurisdiction in the premises of the Commission, and formal pleas to the jurisdiction were offered by several. The same were overruled and the hearing ordered to proceed.

After numerous objections had been suggested as to the first of the proposed rules, and before any testimony was offered, it was suggested that a recess be taken and the respondents hold an informal conference for the purpose of agreeing, if possible, as to objections of any of the proposed rules or upon rules to be suggested in lieu thereof. The [fol. 31] Commission was invited to have a representative in this informal conference.

Upon resumption of the hearing attorneys reported the unanimous willingness of the respondents to adopt the proposed rules with certain changes which were suggested and submitted.

One witness was put on the stand to set forth the reasons the respondents desired to offer supporting the desired amendments to the rules as proposed. The testimony of this witness was offered as in behalf of all the respondents present. Notwithstanding a reminder to the Commission by one of the attorneys that he still objected to the jurisdiction of the Commission, there was a clear disposition on the part of the witness and of all the operating manufacturers and dealers present, to co-operate with the Commission in the fullest degree, to the end that the interests of the public and the respondents alike be fully protected in the proposed rules and regulations. It was urged that rules unduly burdensome in character must necessarily result in ultimate disadvantage to the public.

The Commission being fully advised in the premises finds that the rules and regulations proposed, with amendments as agreed to in conference, are in the interest of fair and adequate service to the ice consuming public of Oklahoma, and should be adopted and made effective.

Wherefore, the Commission having given full consideration to the foregoing facts and to all the facts in the premises, it is ordered that the following rules shall be adopted, and the same are hereby adopted, for the regulation and control of the business of distributing ice in the State of Oklahoma.

Rule 1. Ice shall be sold in units of 12½ pounds, 25 pounds, 50 pounds, 75 pounds, 100 pounds, 150 pounds, 200 pounds and 300 pounds, and in any amount above 300 pounds in cake lots to any person, without discrimination, who desires to purchase the same and is ready to pay the regularly established price therefor; provided, this rule shall not be construed to require sale to a competitior, nor to require any concern to sell at retail unless it is regularly engaged in the retail business; and provided, this rule shall not apply when such company's requirements for his, or its, regular trade; provided further, that this rule shall not [fol. 32] be construed to require sale of ice for re-sale in locality already supplied at a reasonable price.

Rule 2. All wagons or vehicles used for the delivery of ice shall be equipped with accurate scales for weighing the same.

Rule 3. All ice shall be weighed at the wagon, in purchaser's presence, without additional charge.

Rule 4. All complaints of short weight must be promptly and equitably adjusted with the customer by the distributing agency.

Rule 5. Delivery districts shall include all territory properly and reasonably includable in the business or residence district of the city or town served, regardless of the political boundaries thereof, and all purchasers within such delivery district shall be served without discrimination; provided, however, that where there is more than one person or company delivering ice in any city or town, different districts need be served by only one such person or company.

Rule 6. All ice offered for sale to the public for domestic consumption shall be clean ice, manufactured from pure water.

Rule 7. Drivers or deliverymen shall be courteous in their dealings with patrons and the public.

Rule 8. Any information requested by the Corporation Commission concerning the business or service involved in this order shall be furnished within the time specified in such request.

This order shall be in full force and effect from and after the 15th day of July, 1921, and shall remain in effect pending further order of this Commission in the premises and in this cause.

Done at Oklahoma City, Oklahoma, this 15th day of July, 1921."

Continuing his testimony witness W. P. Hill stated (p. 64) that after the passage of the present act there was a general improvement in the conditions of the business; that complaints are still referred to the office of the association by the Corporation Commission so that adjustment may be [fol. 33] made, if possible, without hearing; during the last year there was but one complaint that reached him; it was in the nature of a 'phone call to the Commission, and by the Commission referred to him; in the year 1924, prior to the passage of the act, he would say the complaints reached hundreds in number; since the passage of the act ice consumption and production were increased; in 1925, at the time of the adoption of the law, there were approximately 160 ice plants in operation in Oklahoma with 700,000 tons production; the tonnage has been materially increased, but the number of plants has not been increased more than 25; that shortly prior to the passage of the act, and since, the process of manufacturing ice has been changed; they were being converted from steam or distilled water plants into what is known as electrically driven raw-water plants; a considerable number of the steam or distilled water plants have been converted into raw-water plants; the cost of erecting a plant in 1925, as determined by hearings had before the Commission, was about $2500.00 per ton capacity; of course that varies with the character of the property upon which the plant was constructed, the nature of the equipment and so forth; at the time the law went into effect there were eleven or twelve communities in the state that had more than one ice plant; among these eleven or twelve there were five or six places that had no semblance of competition; in other words, the plants would sell their ice to a common delivery system; the delivering company would

be composed of men who owned and controlled the properties;; the ice manufacturing plants would continue to operate under their corporate names, but would be owned in fact by the delivery system; there were six or seven points where there might be said to be competition; figured on a basis of 2,000,000 population, for year 1920, something like 235,000 people were residents of competitive points, but in none of the places presumably competitive were there anything like substantial differences in prices—they were practically uniform; once in awhile there would be a flurry, ice would drop a little among certain classes of trade, and then go back again; the peddler system was in vogue in Oklahoma City and some other points; the peddler was an independent dealer; owned his own equipment—it might be a horse, or wagon, or truck; he would start peddling when it was the busy ice season, distribute where he pleased in [fol. 34] the nature of routes, but when the hot weather was over, the peddler would quit and leave the community without ice delivery, unless the established companies took it up where he left off; in other words, the peddler took the cream of the businss and quit with cooler weather; the public that wanted ice would have to look for another source of supply; that the Commission has established a requirement of twelve months delivery in any community where there is a demand for ice; as a general policy, before 1925 or passage of the present law, wagons were not equipped with scales, and but a very small portion of ice was scored; by "scoring" ice is meant that a block of ice to be delivered at 300 pounds is frozen at a weight of from 12 to 16 pounds greater; when the ice is taken from the storage room it is put through a machine with saws; these saws are set at measurements that conform to the weight of the block—one will go down the middle and there will be five that will score side-ways and measured according to cubic contents; they will embrace the ice with a cut of from one to two inches deep; one saw will make a hundred pound block; another a fifty pound block and so on; in other words, it divides the ice into correct and differing weights in proportion to the size of the block; prior to the passage of the present law there were not ten plants in the state with scoring machines; at present they all have it where the manufacturer has a rated capacity of twenty tons or more per day; this insures correct weight to the customer;

another abuse arising from peddling ice was the peddler would have coupons redeemable, of course, by himself; these coupon books were often sold and the peddler would quit his route and the customer was left without remedy; prior to the passage of the act of 1925 there were ice dealers in every little town of from four hundred to five hundred population—it might be that the butcher-shop or a merchant kept ice in his refrigerator box, and if people wanted it, they would go to the ice dealer to get it; often some two or three men would keep it; the business was unprofitable under those conditions and the service was poor; the dairy business has made such rapid strides in the state that by rule of the Commission ice manufacturing companies are required to supply the communities where manufacturers have a license, and they are required to take a license for these small communities; in all of the communities lying be- [fol. 35] tween points supplied from the factory by truck, ice is distributed to farmers upon the ground, and produce such as eggs, butter and milk are now being produced through the use of ice so that they reach the market fresh and saleable; it has increased the production of this kind of farm products to a marked degree; at some points, as at Ardmore, large concentration-buying points are established; they ship out car-loads of butter, chickens, eggs and milk under refrigeration every day; throughout the United States about 20% of the entire ice manufactured is used in moving food and dairy products to the market; the exact proportion used in Oklahoma is hard at present to determine, but the business has increased since 1925 in spite of the in-roads made by private refrigeration; there has been a general average increase of ice manufactured of more than 6% per year since 1925, notwithstanding private refrigeration; the cost of installation of private ice machines will range from $200.00 up to as much as you want to pay; private refrigeration was just coming into use in 1925; whatever growth it may have had has been since that time; since the passage of the Act of 1925 the trend of prices on ice sold in the State has been downward; there has been an increase in the use of ice for household purposes; there has been a decrease in the use of ice for butcher-shops, drug stores, etc., and as aforesaid, there has been a large increase in the use of ice in rural communities; the price of

domestic ice has been materially reduced; prior to the passage of the Act ice was sometimes sold for 25¢ a hundred to certain classes of trade, but it was what was known as "waste" ice—white or broken-up ice, that was sold at a large discount; of course, its refrigeration qualities were good as clear ice, but it could not be used for domestic purposes; it was often dumped in the cooling tower; where ice is delivered from wagons it is not profitable where the delivery amounts to less than 3,000 pounds per day per wagon; in order to give full weight, now required by the Commission, wagons are furnished with fresh ice every 2½ hours; usually this is accomplished through what is known as re-lay trucks that leave the plant with ice for each route at designated points; the re-lay truck meets the wagon, takes the shrunken ice, credits the driver with it and puts fresh blocks in the wagon; where larger blocks are used 3 hours may be sufficient; blocks come out of the plant [fol. 36] weighing from 312 to 320 pounts in order to allow for shrinkage; this system has been established since the passage of the act and is due largely to the requirement of the Commission for full weight; another requirement of the Commission is that regular deliveries must be made in the forenoon; however, special deliveries are made whenever required; prior to the passage of the present act deliveries were most irregular; at the present time the public demands a better service in the ice business than ever before; this is due largely to the activities of the women; ice associations are requested by different schools in the state, and especially normal schools, to send representatives to discuss refrigeration, and classes in chemistry and physics are brought down to the plants and shown through them and instructed as to the manner of manufacturing ice; that the public seems to consider that we are selling a service more than a commodity; that ice is used to render the service of refrigeration; that in 1925 out of the 705,000 tons of ice manufactured and marketed in the State of Oklahoma, a little more than one-third of the ice plants were owned by electric public service companies; the Southwest Light and Power Company, the Southern Ice and Utilities Company and the Oklahoma Gas and Electric Company all owned some plants; the Oklahoma Gas and Electric Company took over eleven plants in one group in 1925; when the law was passed the Public Service Company of Okla-

homa owned more than 21 plants; the Southern Ice and Utilities Company owned six or eight plants; the Southwest Light and Power Company owned seventeen or eighteen plants; the combination of ice companies and electric light plants began somewhere around 1913, and the electric light companies have constantly increased the percentage of their ownership since that time; of course, ice is a seasonable product; the ice season varies somewhat according to weather conditions, but people begin to use it generally from April 1st to April 15th depending on the weather; the peak of the season is reached about July 15th, and the ice season will normally close about September 15th, it varies, of course, somewhat, as the weather conditions vary; ice cannot be shipped any considerable distance and compete with the manufacturer; a car of ice will average 18 tons; in small communities the peak demand will probably be a ton and a half or two tons a day; a car of ice should last [fol. 37] about a week but for the shrinkage; the natural result is that towards the latter part of the week the loss in shrinkage is so great, and the block of ice becomes fragile and easily broken, so that he cannot furnish the quality or weight of ice that the manufacturer would and is bound to lose his trade; another thing, there has been no satisfactory way found to ship ice so that the blocks won't break in shipping; it is a product that should be got to the consumer as quickly as possible after its manufacture, and this has resulted from the supervision of the Corporation Commission; the average man in the ice business attempts now to obey the law and the orders of the Commission; this results partly from fear of fines and punishment and partly through a desire to co-operate with the Commission; plaintiff's Exhibit Three then introduced in evidence showed an increase in daily capacity of ice plants of the State from 5,045 tons in 1925 to 6,078 tons in 1928.

Cross-examination:

On Cross-examination witness testified that he was Vice-President of the Western Ice Company, Western Ice and Cold Storage Company, and Seminole Ice Company and on the Board of Directors of the Maude Ice Company; that he and his associates controlled fifteen (15) plants; witness was sure that the business would not have been conducted since 1925 as efficiently as it had been throughout the State

had there not been some force greater than a man's willingness to act that compelled the things done; that there was nothing in the law prior to 1925 that kept the ice manufacturers from doing what they had since the passage of the act, but it simply was not done; the Oklahoma Ice Manufacturers Association was composed of ice manufacturers and machinery people and those who had an interest in the business; where the ice plants are owned by public utilities they are not operated under a franchise; it was a side issue to the light business, but the operation of these plants entered into their rate hearings had before the Commission where there was combined ownership; the State Board of Equalization does not assess ice plants as such; but does assess ice plants owned by public utilities; witness had acquired a portion of his interest in ice property prior to the passage of the Act of 1925, and a portion had been acquired since; as Secretary of the Ice Association the greater [fol. 38] portion of witness' time was spent running down complaints and trying to adjust them between the manufacturer and the customer; trying to prevent discrimination; a part of his duty as secretary was to collect data on manufacturing of ice, methods of distribution and uses of ice, but at present the greater part of the work of the association is in the nature of home service work in carrying the message of refrigeration to the average home and instructing women how to use it, and how to keep their milk, butter and other perishable foods; this was made necessary because of the unusual growth in the use of ice; people today are using refrigeration that never knew the use of it three or four years ago; this is especially true of the laboring classes; of the farmer; and of the poorer classes of people; it is in this class of the business that the industry has grown; the loss to the manufacturer of ice in sales has been in restaurants and places of that sort—it has not been in the home; in some of the farm communities there is a five year program established for greater gain in dairy and food products; the ice routes are established in circuits—going from one community to another; out of Ardmore we have some six or seven and are adding more this year; these rural routes were not in existence prior to the passage of the present law.

CAMPBELL RUSSELL (p. 99) testified he lived in Oklahoma City, and from the years 1917 to 1922, inclusive, had been a member of the Corporation Commission of the State of Oklahoma; that during these years the Commission exercised general jurisdiction over the ice business in the State with reference to rates, practices and service; that in October, 1918, the Commission in their annual report transmitted a letter to the Governor with reference to the acts of the Commission and their recommendations; that as to the ice business they said (p. 100):

"The ice business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electricity or gas service, and should be subject to the same regulation. Complaints are constantly being made to the Commission in reference to the prices of ice, practices of ice companies or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust [fol. 39] law. Specific legislation should be enacted in reference to these companies, and the power of regulation should be made definite and certain."

The occasion for this recommendation was that the Commission felt their power should be made more definite; that the things that brought to the Commission's notice the need of this sort of legislation were complaints of neglect of service, short weight, poor quality of ice and prices that were considered unfair; that from time to time they had ice companies cited before them relative to prices; in the Message of 1915 and 1916, prior to his term of office, the Corporation Commission of that date had suggested to the Governor under title "Scope of Legislation" the following (p. 101-102):

"Pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extend the jurisdiction of the Corporation Commission over water, heat, light and power plants, but does not include ice plants. Numerous complaints are received by the Commission each year as to exorbitant prices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Cor-

poration Commission over ice plants as it exercises over gas, electric and water companies."

Another letter was identified by the Commissioner that it was agreed by counsel was in terms substantially the same as the two other letters, except that it contained the specific statement that complaints had been received from more than one hundred citizens and towns in the State.

Cross-examination:

That the regulation effected, prior to the passage of the present ice law, was under the Anti-trust Act.

L. J. LAHMAN (p. 105) testified that he lived in Oklahoma city, and had been in the ice business since the Winter of 1923; was assistant general operating manager of the Southwest Utility Ice Company; that he had been engaged in the manufacturing as well as the delivering end of the business prior to the time he had been assistant manager; [fol. 40] he had managed properties in Kansas, and was manager of the City Ice Company of Enid, Oklahoma, at one time; last year was in charge of distribution and sales of ice in Detroit, Michigan; that he was familiar with the price of ice in Oklahoma beginning with the year 1925 until the year 1930; that the compiled average figures on the State show as a whole a decrease in the price to the consumer; that Complainant's Exhibit 5 was taken from the prices of retail ice, as shown by the records of the Corporation Commission; that the amount saved to the consumer, as shown by these prices, for the various years was as follows:

1926	1927	1928	1929
$55,279.04	$89,715.24	$287,260.80	$328,223.80;

that the estimated saving for 1930, based on 715,000 tons production, would be $414,700.00; that the operating season of the ice business in Oklahoma has averaged 116 days in the 365, or 32% operating season out of the year; the comparative production by way of illustration for the month of January, 1928, was 2.31% of the total for that year; the reductions made were generally on request or

order of the Corporation Commission; that the effect of the act had not tended to combine the ice plants in Oklahoma to a greater extent than combinations were carried on in other states; that the same merging operations were going on in just as large proportion without the law; that in 1925, in compliance with the law, schedules were filed for towns without manufacturing plants, and rural communities and rural routes affecting 378 places; that in 1930 there had been filed with the Corporation Commission 769 schedules covering the same class of locations; an increase in the rural portions of the State of more than 100% coverage; that the first attempt at the operation of rural routes in the State was in 1924; that with the protection given by the present ice law companies could undertake distribution in the rural communities that would be impractical without; the result of the rural service had been to increase the production of milk, butter, fresh vegetables and eggs for the farmer could preserve his products until he could get to market with it; that the dairy business had been developed extensively; specific instances might be cited in cities of Hobart, Enid and Ponca City, all in Oklahoma, where the availability of ice had built up a large [fol. 41] dairy trade, supplying it not only for local demand but in sufficient quantities for cheese factories and as a collecting point for cream stations; that Swift and Armour have started plants there within the last two or three years, and the same is true as to many other cities and towns throughout the State; the growth having been subsequent to the passage of this Act; an examination of the records of the Corporation Commission showed that in the State of Oklahoma, prior to the passage of the 1925 ice law, there were but seven towns in the entire state that had more than one ice plant; there had been two in Guthrie; one had gone bankrupt; there had been two in Pawhuska; one had gone bankrupt; in Ponca City there had been two, but they had merged, and the plant was still operating; there was no change in the price of ice at any time because of the building of another plant; whether there were two or more plants the price in the points where these plants were was uniform; that there were numerous towns in the State, prior to the passage of the Act, suffering severely from the conditions existing; the operators of plants were indifferent to the wants of the public, and were interested only in

squeezing the most profit from the operation of their plants; they were inconsiderate of the convenience of their patrons and their prices were exorbitant; they made no *no* effort to control delivery of proper weights, and attempted to economize so greatly on delivery operation that the housewife frequently had to stay at home until five or six o'clock in the afternoon uncertain as to when the ice man would come; that conditions have materially bettered since the passage of the Act; that the Commission has forced all ice men to install scoring machines in plants exceeding 20 tons capacity that practically eliminated the cutting of short weight ice; the fines that have been imposed have kept the Manager and producer on their toes; delivery is completed today not later than 2 or 3 o'clock in the afternoon because he knows complaints on service will be reported to the Commission and he will have to answer for it; the basis for establishing the price of ice under any circumstance is the cost of producing and delivering; duplication of manufacturing equipment and delivery equipment, and expenses of delivery, necessarily makes for high prices; it is also necessary for those operating in the same community to maintain the price of ice high enough to cover the cost of investment or one [fol. 42] or the other will go broke; with these conditions existing at some time the public will have to pay the exorbitant price; that a large percent of the ice manufactured and sold goes to the preservation of food; in Oklahoma City in the month of April, the present year, the delivered sales were to the retail trade 21.14 per cent; delivered sales, commercial, to stores, restaurants, and businesses of like nature, 37.12 per cent; of the platform sales 24.9 per cent of the total was sold to those who took ice to their homes; 13.81 per cent was sold to the wholesale trade; car-icing was 2.92 per cent; the remainder, about 9/10 of 1 per cent of the total, was car load shipments out of town; in the summer time more than 50% of the delivered retail trade goes to the home; approximately 15% to 20% of the ice manufactured in the State of Oklahoma is consumed in the refrigeration of food products in transit either from the State out or in transit through the State.

Edwin Dubarr (p. 128) testified that he lived at Norman, Oklahoma; had been connected with the University of Ok-

lahoma from the year 1892 to 1923; had been the head of the Department of Chemistry, and at times Dean of Pharmacy; had a part of the time been State Chemist for Public Health and Food Commissions; that he had made a study of the use of ice as applied to perishable fruit products and also to health conditions of the state; that it conserves the food products by saving them and keeping them in a good, usable condition for a longer time; that it conserves the health in furnishing suitable foods for the body and in the cure of disease; that ice bears a very important relation to the dairy business and was necessary in keeping milk, cream, butter and cheese at temperatures necessary for its preservation; that the use of ice in a general way not only helps the baby, but it helps the aged, and those between the baby and old age; that the growth and development of the production of perishable food products in recent years in Oklahoma has been very large due to the use of ice; that ice was *no* necessary that it was not only indispensable but absolutely a necessity in the summer time for the preservation of food products and milk to be use- for infants; that in the campaign for milk and ice for the babies that goes on every year in this state, he not only assisted in begging for it, but would almost steal; under present conditions [fol. 43] a household cannot maintain itself and keep its food in decent condition without plenty of ice or refrigeration; that cold water from a spring might be a good substitute, but not as good; the only place to get water cold enough was somewhere like Yellowstone National Park, where the air comes out of the earth at 37°; that in the majority of cases ice is an absolute necessity for health and keeping food in a decent condition.

Cross-examination:

The protection of babies makes it necessary to keep their food and milk at proper temperatures, and the temperature around a child is important; warm milk, unless it comes from the mother's breast, is not good for the child; ice is not more important than milk, but if the milk had soured it is of no use for babies; that he had been studying chemistry for more than 50 years; that even as a boy he had found that food would spoil if you did not have ice to preserve it.

L. C. SMITH (p. 134) testified that he was Secretary of the National Association of Ice Industries, and had been such for 13 years; that about 84% of the ice produced in America was manufactured by members of his association; based upon actual tonnage reports from members of his association, taken from the nation at large, the ice business for the last eleven years had increased upon an average of 5.35 per cent per year; that in 1914 there was in the neighborhood of 2700 ice plants in the United States; at present something in excess of 6200; the growth had been under two classifications—one in congested cities; the other in the development of perishable products in southern countries, California, Arizona, along the Rio Grande Valley, Alabama, Mississippi, and Florida; these two had shown the most marked development; the consumption of ice by retail domestic consumers during these years had largely increased; statistics showed that 29% of the ice manufactured or produced went to the domestic consumer in 1919; in 1929 47% was consumed by the domestic consumer; in 1919 the per capita consumption of ice was 712 pounds; in 1929 it was 1157 pounds per capita, taking the nation at large.

[fol. 44] A. J. AUTHENRIETH (p. 140) testified that he was a refrigerating engineer; had been since 1896; was now in the operating and construction department of the Middle Western Utility System, and had about 300 plants under his supervision located in fourteen different states; that he had made a very extensive study of the use of ice in the transportation of food products throughout the United States; that attempts had been made to find a substitute for ice; that the attempts were unsuccessful; that the merchandising of ice differed from the merchandising of other food products in that it was a perishable product, and it must evaporate in order to work or obtain its refrigerating effect; it must be put to use soon after it is manufactured in order to get the effects of it; it is a very perishable product and cannot be kept in storage for a long time, except at very low temperatures; in other words it should be marketed as it comes from the freezing vats; that delivery by wagon to the domestic trade is limited to a radius

of from 12 to 15 miles; that it could not be shipped without ruinous loss over 50 or 75 miles; if it is to be used for domestic purposes after shipment it must be immediately unloaded and put in a room cooled below 28°; that the manufacture of ice is a rather a highly specialized business; in order to produce ice in any plant there are three distinct systems; the ammonia system, the air system and the water system in what is known as the raw water plant; if it is a steam plant you have ammonia system, and water system and steam system; the production of merchantable ice is a highly specialized thing; water and air have all to do with the quality of ice you are going to produce; the water must be specially treated if it comes to your home free from bacteria; if you get water from city mains it may be so highly mineralized that you cannot make a clear block of ice out of it; it requires then special air treatment; the manufacturer of ice machinery does not look after this; the ice machine manufacturer will guarantee to build you a plant that will produce 20 tons of ice a day; a clause provides that if the water needs treatment, you must furnish the equipment –they do not guarantee the quality of ice; ice is more of a chemical proposition than an engineering problem; if you don't have proper treatment of the water and proper air agitation, you make white blocks of ice; the cost of building a plant will vary in ton capacity in various localities; it runs from $1750.00 a ton to $2500.00 [fol. 45] a ton, depending upon local conditions entirely; about 20% of the entire ice produced is now used in the preservation of food and food products in transportation; ice is the conservator of the nation's food supply; without ice we could not exist; in the large cities, like New York and Chicago, in the Winter months they are dependent on California, Arizona, Texas, Florida and the South Atlantic states for their Winter fruits and vegetables; without ice they would be deprived of these during the cold months of the year; in Texas and California, and the South, when the supply of vegetables has moved North and the crops are done in the South, the reverse operation takes place, and they get their vegetables from the Northern States under refrigeration; that actually covers America as such; that in 1922 there were loaded in Oklahoma 1676 cars of food products under refrigeration; in 1925, 2940 cars were so used, and in 1929, 3347 cars were so used;

that progress in this line could not have been possible without the use of ice.

STIPULATION AS TO FACTS

It was then stipulated that the law as it is now upon the statute books had been generally acquiesced in by the industry from the date of its passage to the present time, and that the parties complainant were engaged in the manufacture and sale of ice in Oklahoma City under a permit issued by the Corporation Commission under the provisions of the Act in controversy.

There was no further evidence offered by the defendant, whereupon the taking of testimony was closed and the cause submitted.

The above and foregoing is all the evidence introduced at the trial of said cause and all proceedings had in the trial thereof.

Whereupon, complainant-appellant prays that the above statement of evidence be settled, approved and allowed by this court as a full, true, correct and complete statement of all the evidence taken and given on the trial of said [fols. 46-52] Cause, for use on the appeal taken to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated October 30th, 1930.

Everest, Dudley & Brewer, Andrews & Aston; Rainey, Flynn, Green & Anderson, Solicitors for Complainant-Appellant.

IN UNITED STATES DISTRICT COURT

ACCEPTANCE OF SERVICE AND APPROVAL OF STATEMENT OF EVIDENCE

Service of the foregoing statement of evidence, and a receipt of copy thereof, is hereby acknowledged this the 30th day of October, 1930.

Geo. M. Nicholson, Owen & Looney, Solicitors for Defendant.

We have examined the above and foregoing statement, find the same true and correct and hereby agree that such statement may be approved by the court, without notice, and included in the transcript on appeal in said cause.

Dated this the 30th day of October, 1930.

Geo. M. Nicholson, Owen & Looney, Solicitors for Defendant.

The foregoing narrative statement of the evidence is hereby allowed and approved and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above entitled cause as provided in Sub-division (b) Equity Rule 75.

Dated this 13th day of November, 1930.

John C. Pollock, District Judge.

[File endorsement omitted.]

[fol. 53] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, APRIL TERM, 1931

No. 405

THE SOUTHWESTERN UTILITY ICE COMPANY, a Corporation, Appellant,

vs.

ERNEST A. LIEBMANN, Appellee

No. 406

NEW STATE ICE COMPANY, a Corporation, Appellant

vs.

ERNEST A. LIEBMANN, Appellee

Appeal from the District Court of the United States for the Western District of Oklahoma

Mr. J. B. Dudley and Mr. Guy L. Andrews (Mr. J. H. Everest, Mr. Phil D. Brewer, Andrews & Aston, Rainey,

Flynn, Green & Anderson, and Mr. E. S. Ratliff were with them on the brief) for appellants.

[fol. 54] Mr. Geo. M. Nicholson and Mr. Thos. H. Owen (Mr. M. A. Looney was with them on the brief) for appellee.

Before Cotteral, Phillips and McDermott, Circuit Judges

OPINION—Filed Aug. 20, 1931

PHILLIPS, Circuit Judge, delivered the opinion of the court.

These suits involve the constitutionality of Chap. 147, Okla. S. L. 1925, the provisions of which are set forth in Marginal Note 1.

Note 1

"Section 1. That the manufacture, sale and distribution of ice within the State of Oklahoma is hereby declared to be a public business, as defined by Section 11032, of the Compiled Statutes of Oklahoma.

"Section 2. That no person, persons or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission of the State of Oklahoma. The license fee hereunder shall be the sum of fifty cents (50c) per ton per annum, of the daily capacity of ice manufactured, sold or delivered but the minimum license shall be five dollars ($5.00).

"Section 3. That the Corporation Commission shall not issue license to any persons, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within this State, except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice, or either of them, at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation, already licensed by said commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Com-

mission may refuse and deny the applicant (sic) for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public, provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State whose license shall be granted and issued by said Commission, upon application of such person, firm, or corporation and payment of license fee."

Section 4 provides the procedure for applying for a license and the hearing thereon.

"Section 5. That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the affording of all reasonable conveniences, facilities and services, as it may impose as to the transportation and transmission companies.

"Section 6. All and any orders made by said Commission fixing rates, charges, rules and regulations as to any person, firm or corporation engaged in the manufacture, sale and distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma.

"Section 7. Any person, firm or corporation who shall engage in the business of manufacturing, selling and distributing ice or engage in either of said businesses, without

first obtaining a license, provided for herein, shall be guilty of a misdemeanor and any such person shall be punishable by a fine not to exceed twenty-five dollars ($25.00), and each day's violation shall constitute a separate offense; provided, the Corporation Commission is hereby authorized to promulgate general orders not in conflict with this Act, and to enforce such orders against any person, firm or corporation manufacturing, selling or distributing ice or engaging in either of said businesses, by imposing a fine for the violation thereof not to exceed five hundred dollars for each of said violations."

"Section 8. Any person, persons or corporations aggrieved by any rate, or service, may file an application for a hearing under the terms and conditions of this Act."

Section 9 is a general repealing clause.

[fol. 55] The Southwest Utility Ice Company and the New State Ice Company, hereinafter called plaintiffs, are engaged in the manufacture, sale, and distribution of ice at Oklahoma City under licenses issued by the corporation commission pursuant to Chap. 147, supra. The last license in the record expired June 30, 1930. Renewals of such licenses are neither pleaded nor proven. This alone would justify an affirmance of the decree below, but, in view of the statement of plaintiffs' counsel at the oral argument that such licenses were in fact renewed, we proceed to a consideration of the merits.

If the statute is valid, a license issued thereunder is a property right in the nature of a franchise granted in consideration of the performance of a public service and is within the protection of the Fourteenth Amendment. Frost v. United States, 278 U. S. 515, 519, 520.

In February, 1930, Liebmann, hereinafter called defendant, commenced the construction of an ice manufacturing plant in Oklahoma City and was about to engage in the manufacture, sale, and distribution of ice in that city without first having obtained the license required by Chap. 147, supra. Plaintiffs brought separate suits to enjoin defendant from so doing. The two suits were consolidated for trial.

These cases present the single question: Is the business of manufacturing and selling ice of such a character that [fol. 56] it is subject to regulation to the extent of requiring a certificate of convenience and necessity before a person may engage in such business? Or, to put it another way, may the state prohibit one man from manufacturing ice on his own property and selling it to his neighbor at a price they mutually agree upon? The trial court answered these questions in the negative, and entered a decree dismissing the bills.

Prior to the enactment of Chap. 147, supra, the corporation commission from time to time by order had regulated the price of ice, and its authority so to do had been upheld by the Supreme Court of Oklahoma in Oklahoma L. & P. Co. v. Corporation Commission, 96 Okla. 19, 220 Pac. 54. The corporation commission, under powers granted by prior statutes, had also made and enforced regulations governing the manufacture and sale of ice, to insure honest weights, pure and wholesome ice, and adequate delivery service. By Chap. 147, supra, the legislature undertook to grant the additional power to regulate by limiting the number of persons who might engage in the ice business in a given territory.

While there is no such thing as absolute freedom of the citizen to engage in a lawful business, to make lawful use of his property, or to contract with respect thereto, and such rights are subject to a great variety of restraints, freedom in respect thereto is the general rule and restraint thereof the exception; and the exercise of legislative authority to abridge such rights can be justified only by the existence of exceptional circumstances. Adkins v. Children's Hospital, 261 U. S. 525, 546; Ribnik v. McBride, 277 U. S. 350, 356.

In Williams v. Standard Oil Co., 278 U. S. 235, the court said:

"It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * That phrase, however it may be characterized, has become the estab-

lished test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or prop- [fol. 57] erty, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In Tyson & Bro. v. Banton, 273 U. S. 418, the court said:

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.

"The characterization in some decisions of businesses as 'quasi public,' People v. King, 110 N. Y. 418, 428 'not "strictly" private,' Aaron v. Ward, 203 N. Y. 351, 356, and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalent for the description 'affected with a public interest,' as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite

and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legis- [fol. 58] lative regulation of the manner in which a business shall be carried on. * * *

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, * * * that it shall be devoted to 'a public use.' Stated in another form, a business or property in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."

However, the fact that a business is "affected with a public interest" does not subject it to unlimited regulation. In Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, the court said:

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

In Tyson & Bro. v. Banton, supra, the court further said:

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, Case of the State Freight Tax, 15 Wall.

232, 278, and, as such, within the protection of the process [fol. 59] of law clauses of the Fifth and Fourteenth Amendments. See City of Carrollton v. Bazzette, 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all."

A state may not, under the guise of protecting the public, arbitrarily prohibit a person from engaging in a lawful, private business, or impose unreasonable and unnecessary restrictions upon such a business. Burns Baking Co. v. Bryan, 264 U. S. 504, 513; Liggett Co. v. Baldridge, 278 U. S. 105, 113; Lawton v. Steele, 152 U. S. 133, 137; Meyer v. Nebraska, 262 U. S. 390, 399, 400.

A declaration by the legislature that a business is affected with a public interest is not conclusive. The matter is always open to judicial inquiry. Wolff Co. v. Industrial Court, supra, p. 536; Tyson & Bro. v. Banton, supra, p. 431.

The inquiry then is whether the manufacture and sale of ice is a business affected with a public interest to the extent required to justify the regulations sought to be imposed. This requires an examination into the nature of the business, the features thereof which touch the public, and the abuses reasonably to be feared. Wolff Co. v. Industrial Court, supra, p. 539.

In Wolff Co. v. Industrial Court, supra, the court divides businesses, said to be "clothed with a public interest," into three classifications, as follows:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. State v. Edwards, 86 Me. 102; Terminal Taxi-[fol. 60] cab Co. v. District of Columbia, 241 U. S. 252, 254.

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be enitled to protection accordingly."

The right to manufacture and sell ice is not a privilege in the nature of a franchise, such as the right to maintain a public wharf, or to operate a railroad or a street railway (26 C. J. p. 1011, Sec. 4; 51 C. J. p. 411, Sec. 8), but is a matter of common right open to all. Cap. F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S. W. (2d) 993. Furthermore, it does not require a franchise to use the public streets.

It is clear that the ice business in its inception did not fall within either the first or second classification set forth in Wolff Co. v. Industrial Court, supra; Ice Co. v. Franklin Utilities Co. supra; State v. Orear, — Mo. —, 210 S. W. 392, 396, 397.. Therefore, we must determine whether there has come to exist in the manufacture and sale of ice peculiar conditions which have a definite relation to the public interest sufficient "to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use" and bring it within the third classification. Tyson & Bro. v. Banton, supra, pp. 433, 438; Ribnik v. McBride, supra, pp. 355, 356.

In Wolff Co. v. Industrial Court, supra, the court further said:

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

[fol. 61] When rates or charges in a business are fixed by public regulation, competition is largely removed. Such rates must be sufficient to produce a fair return upon the

value of the manufacturer's plant used and useful in the business. Permitting additional plants to enter the field in excess of the market requirements, unnecessarily increases rates to be fixed by the regulatory body and paid by the consumer. It is to prevent such needless duplication of plants and facilities, and the consequent increase in rates or charges, that certificates of public convenience and necessity are required. Idaho Light & Power Co. v. Blomquist, 26 Ida. 222, 141 Pac. 1083, 1089, 1090.

The regulation of the price at which ice may be sold is an extraordinary interference with the liberty of the citizen (Near v. State of Minnesota, 283 U. S. —; Tyson & Bro. v. Banton, supra, p. 431; Ribnik v. McBride, supra, p. 356; Adkins v. Children's Hospital, supra, pp. 546, 560, 561), and can only be justified by the existence of exceptional circumstances making it necessary for the protection of the public.

Notwithstanding the close relation between price regulation and the requirement of a certificate of convenience and necessity, we are of the opinion that a limitation on the right to engage in a business which is a matter of common right is an even greater encroachment on the rights of the citizen than the regulation of prices in such business. Hence, to justify such a limitation, there must exist stronger circumstances, making the regulation necessary in order to protect the public, than are required to warrant the fixing of rates or prices.

In 1929 Arkansas adopted a statute by which it undertook to empower the railroad commission to fix the price and regulate the delivery or distribution of manufactured ice, and to limit the number of persons who might engage in the manufacture, sale, or distribution of ice in a given territory. See Act 55, General Assembly of Arkansas, 1929. The validity of this statute came before the supreme court of that state in Ice Co. v. Franklin Utilities Co. supra. The court sustained the provisions of the law empowering the railroad commission to fix the price of ice, but held the provisions authorizing that commission to limit the number of persons who might engage in the manufacture and distribution of ice in a given territory to be an undue in- [fol. 62] terference with the common or natural right of the citizens to engage in such business, not necessary for the protection of the public interests, and in violation of

the provisions of the Arkansas constitution prohibiting the creation of a monopoly and of the Fourteenth Amendment to the Federal Constitution.

Ice is now generally used for the conservation and preservation of food stuffs and in the treatment of the sick, and is recognized as a necessary and indispensable commodity. However it is no more essential than are meat, bread, clothing, or coal, and "it has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood-chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation," and "one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sell to the public in the common callings of which those above mentioned are instances." Wolff Co. v. Industrial Court, supra, p. 537. Therefore, it becomes pertinent to inquire whether there is sufficient actual or potential competition in the sale and distribution of ice to protect the public from arbitrary treatment and exorbitant prices. Home ice manufacturing plants are now available to persons of average means. Many hospitals, restaurants, meat markets, hotels and dairies have their own ice manufacturing and refrigerating plants. Ice may be shipped by rail in refrigerator cars a distance of 100 miles at an approximate cost of ten cents per hundred. It may be transported in insulated trucks over improved highways a distance of 75 miles and sold in competition with local ice manufacturers. Ice manufacturers in Oklahoma in 1925 operated 378 rural routes extending 25 to 30 miles from their plants through sparsely settled territory, and delivered ice to consumers on farms and in small communities. In 1930 such routes had been increased to 769. Therefore, while one ice plant can supply the ice needs of an ordinary city, and most of the smaller cities have only one ice plant, if an ice manufacturer in a town having only one plant should demand excessive prices, manufacturers in nearby towns, in the absence of monopolistic trade agreements, would normally compete by shipping in ice by rail or trucks.

[fol. 63] Counsel for plaintiffs assert that a carload of ice will weigh approximately eighteen tons; that a small com-

munity will consume only about one and a half tons per day, and that it is therefore impractical to ship ice to such a community in carload lots because of the loss from shrinkage and the carrying expense. Of course this is true, but such a community could not support a small commercial ice plant and would have to be served through truck transportation from ice plants in larger cities.

Counsel for plaintiffs further assert that since the adoption of Chap. 147, supra, the quality of ice has improved, honest weights have been given, regular deliveries have been maintained, and the amount of ice used has greatly increased. While only two states, Oklahoma and Arkansas, have enacted statutes to fix prices and limit the number of persons who may engage in the ice business, we know as a matter of common knowledge that such improvements have taken place in other states. Therefore, they are not attributable to, and may be accomplished without such regulations. To a large extent, they may be ascribed to the efforts of the National Association of Ice Industries. Eighty-four per cent. of the ice produced in the United States is manufactured by members of that association. People have learned the value of ice for the conservation and preservation of food and health. They are buying and using it in increasing quantities. Ice plants in the United States increased from 2700 in 1914 to 6200 in 1929. The annual per capita consumption of ice in the United States increased from 712 pounds in 1919 to 1157 pounds in 1929. Business and home refrigeration plants have produced competition. Scoring machines by which ice is cut into uniform over-sized blocks to compensate for loss from shrinkage came into use about 1925. Resulting improvements in the quality of ice and in service have naturally followed.

Neither has the Oklahoma law resulted in lowering of the price to the consumer. On the contrary, the price of ice in that state, if allowance is made for the decrease in the cost of manufacture, has increased. Furthermore, the cost of ice in Oklahoma compares unfavorably with the cost of ice in other southern states. The prices of ice during the year 1928, three years after the adoption of the Oklahoma statute, in eleven southern states, as shown by [fol. 64] the last edition of the Ice Blue Book (a standard authority) published in 1928, are as follows:

	Domestic Trade (100 lbs.)	Light commercial (160 lbs.)	Heavy commercial ton	Dealers, ton	Carload, ton	Car Icing, ton
Alabama	58.5c	43.4c	$7.55	$7.00	$4.75	$6.18
Arkansas	59.2c	46.7c	7.92	6.89	4.83	6.00
Florida	61.0c	40.5c	6.67	6.73	4.22	5.96
Georgia	62.5c	48.0c	7.72	5.75	4.25	5.75
Louisiana	53.0c	42.0c	7.03	5.50	4.50	5.87
Mississippi	63.3c	48.8c	8.14	6.88	5.00	6.82
N. Carolina	60.5c	42.0c	7.25	4.56	3.83	5.46
Oklahoma	70.0c	50.0c	8.60	6.96	5.90	7.70
S. Carolina	62.0c	48.5c	8.20	6.50	5.00	7.50
Tennessee	54.0c	44.5c	7.40	5.33	3.80	6.15
Texas	64.0c	42.0c	8.10	6.00	4.58	6.57
Average	60.7c	45.1c	7.50	6.19	4.60	6.36

It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the business, we seriously doubt that the manufacture of ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory.

The decree is affirmed with costs.

[fol. 65] IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Aug. 27, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause, be and the same is hereby affirmed, and that Ernest A. Liebmann, appellee, have and recover of and from New State Ice Company, a corporation, appellant, his costs herein.

[fol. 66] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Sept. 16, 1931

To the Honorable John H. Cotteral, Circuit Judge, or to any Judge of the United States Circuit Court of Appeals, Tenth Circuit:

I

Your petitioner, New State Ice Company, a corporation, the appellant in the above entitled cause, complains of the judgment and decree of the United States Circuit Court of Appeals, Tenth Circuit, made and entered herein on the 27th day of August, 1931, affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, and shows that there was drawn in question in said cause in said Circuit Court of appeals, the validity of the Act of the Legislature of the State of Oklahoma approved April 7, 1925, being Chapter [fol. 67] 147, Session Laws of Oklahoma, 1925, on the ground that said act was repugnant to the Constitution of the United States and that the business of manufacturing, selling and distributing ice to the public in said State was not a business clothed with such public interest as to justify its regulation by the State of Oklahoma or its duly constituted authority.

II

Your petitioner, the appellant in said cause, further shows that it relied upon the validity of said act in bringing the action in the District Court of the United States for the Western District of Oklahoma, and in the prosecution of its appeal from the judgment and decree of that Court to said Circuit Court of Appeals; that said Circuit Court of Appeals, in said judgment and decree, held against the validity of said act.

III

Your petitioner, the appellant herein, feeling itself aggrieved by said judgment and decree, desires to appeal

therefrom to the Supreme Court of the United States and hereby respectfully prays for the allowance of an appeal to said Court, and that supersedeas or cost bond be fixed staying said judgment and decree pending said appeal.

IV

Your petitioner, the appellant herein, herewith presents its assignment of errors upon which it will rely on [fol. 68] appeal.

V

Your petitioner, the appellant herein, further shows that it has from time to time in compliance with the provisions of said Act of the Legislature of the State of Oklahoma, renewed its license, and that it now has, and, at all times since the commencement of said action in the District Court of the United States for the Western District of Oklahoma, has been the holder of a license duly issued by the Corporation Commission of the State of Oklahoma in accordance with the provisions of said act entitling it to manufacture, sell and distribute ice under the provisions thereof.

Wherefore your petitioner prays for the allowance of an appeal from said judgment and decree of said Circuit Court of Appeals to the Supreme Court of the United States and for a supersedeas of said judgment and decree, with directions as to the amount of the bond to be filed to act as said supersedeas.

Dated this the 16th day of September, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Attorneys for Petitioner. Rainey, Flynn, Green & Anderson, of Counsel.

[fol. 69] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 16, 1931

Comes now the New State Ice Company, the appellant in the above entitled cause, and files the following assign-

ment of errors upon which it will rely in the prosecution of the appeal from the judgment and decree of the United States Circuit Court of Appeals, Tenth Circuit, made and entered herein on August 27, 1931, to the Supreme Court of the United States:

(1) That said Circuit Court of Appeals erred in holding that the act of the Legislature of the State of Oklahoma, approved April 7, 1925, being Chapter 147 Session Laws of Oklahoma, 1925, was invalid, on the ground of its being repugnant to the Constitution of the United States.

(2) That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma dis- [fol. 70] missing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States.

Wherefore Appellant prays said judgment and decree be reversed, and for such other and further relief as it may be entitled.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Attorneys for Appellant. Rainey, Flynn, Green & Anderson, of Counsel.

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 406

NEW STATE ICE COMPANY, a Corporation, Appellant,

vs.

ERNEST A. LIEBMANN, Appellee

ORDER ALLOWING APPEAL AND FIXING SUPERSEDEAS OR COST BOND—Filed Sept. 16, 1931

The petition of New State Ice Company, the appellant in the above entitled cause, for an appeal from the judgment and decree of the United States Circuit Court of Appeals, Tenth Circuit, made and entered herein on August

27, 1931, to the Supreme Court of the United States, is hereby granted and the appeal is allowed, and upon said petitioner filing a bond in the sum of $500.00, with sufficient sureties, conditioned as required by law, the same shall operate as a supersedeas of said judgment and decree, and shall suspend and stay all further proceedings in this Court until the determination of said appeal by the Supreme Court of the United States.

Dated this the 16th day of September, 1931.

John H. Cotteral, Judge United States Circuit Court of Appeals, Tenth Circuit.

[File endorsement omitted.]

[fols. 72-79] Supersedeas or cost bond on appeal for $500.00, approved and filed September 26, 1931, omitted in printing.

[fol. 80] Citation, in usual form, showing service on Thomas H. Owen et al., filed October 5, 1931, omitted in printing.

[fol. 81] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed Oct. 5, 1931

It is hereby stipulated and agreed between the parties hereto that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

(1) The petition of the appellant for appeal to the Supreme Court of the United States and the assignment of errors filed therewith.

(2) Order allowing appeal and fixing supersedeas or cost bond.

(3) Supersedeas or cost bond, showing approval thereof.
(4) Citation, with acceptance of service thereof.
(5) Notice of appeal, and acceptance of service thereof.
[fol. 82] (6) The opinion of the Circuit Court of Appeals filed August 20, 1931, together with the decree entered August 27, 1931.
(7) Printed transcript of record of the Circuit Court of Appeals filed December 5, 1930.
(8) This stipulation.
(9) Certificate and Seal.

This stipulation is made under paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, and is in lieu of præcipe and counter-præcipe provided for therein.

Dated this 2nd day of October, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant. George M. Nicholson, Thos. H. Owen, N. A. Looney, Counsel for Appellee.

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

NOTICE OF APPEAL AND ACCEPTANCE OF SERVICE THEREOF—Filed Oct. 5, 1931

To the above-named appellee and his counsel of record:

You are hereby notified that the above named appellant appeals from the decree made and entered herein on August 27, 1931, against it, in favor of the above named appellee, to the Supreme Court of the United States.

Dated this 16th day of September, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant.

[File endorsement omitted.]

[fol. 84] Acceptance of Service

The above named appellee hereby accepts service of the above and foregoing notice this 16th day of September, 1931.

George M. Nicholson, Thos. H. Owen, N. A. Looney, Counsel for Appellee.

[fol. 85] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] In Supreme Court of the United States

Statement of Points to be Relied Upon by Appellant and Stipulation as to Printing Record—Filed Oct. 15, 1931

Comes now the appellant in the above entitled cause and states that the points upon which it intends to and will rely in this Court, are as follows:

Point I

That the Act of the Legislature of the State of Oklahoma, approved April 7, 1925, (being Chapter 147, Session Laws of Oklahoma, 1925), is valid, and the United States Circuit Court of Appeals, Tenth Circuit, erred in holding said Act invalid on the ground that it was repugnant to the Constitution of the United States.

Point II

That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, dismissing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States.

[fol. 87] Point III

That said legislative act declares the manufacture, sale and distribution of ice to be a public business, and, under

the facts and circumstances as disclosed by the evidence, the manufacture, sale and distribution of ice is a public business, subject to regulation and control by the Corporation Commission of the State of Oklahoma under the terms and provisions of said Act, and said Circuit Court of Appeals erred in holding said Act invalid on the ground of its being repugnant to the Constitution of the United States, and in affirming the judgment and decree of the District Court.

The foregoing statement of points is made under paragraph 9 of Rule 13 of this Court, but does not include the parts of the record as therein provided, due to the fact that a stipulation has been signed with reference thereto.

Dated this 12th day of October, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant. Rainey, Flynn, Green & Anderson, of Counsel.

[fols. 88 & 89] Acceptance of Service

Appellee accepts service of the above and foregoing statement of points to be relied upon by appellant, as provided for in paragraph 9 of Rule 13.

The stipulation referred to therein as to the parts of the record has been made.

Dated this 12th day of October, 1931.

George M. Nicholson, Thos. H. Owen, N. A. Looney, Attorneys for Appellee.

[fol. 90] Stipulation as to Printing of Record

It is hereby stipulated and agreed by and between the parties hereto that the following parts of the transcript shall be printed under the supervision of this Court and that the remaining parts thereof shall be omitted:

(1) The petition of appellant for appeal to the Supreme Court of the United States, and the assignment of errors filed therewith. (Transcript, Pages 66 to 70, inclusive.)

(2) Order allowing appeal and fixing supersedeas or cost bond. (Transcript, Page 71.)

(3) Supersedeas or cost bond, showing approval thereof. (Transcript, Pages 72 and 73.)

Omit certified copy of general power of attorney and certain resolutions appearing in the transcript at Pages 74 to 79, inclusive.

(4) Citation, with acceptance of service thereof. (Transcript, Page 80.)

(5) Notice of appeal, and acceptance of service. (Transcript, Pages 83 and 84.)

(6) Stipulation as to contents of transcript of record. (Transcript, Pages 81 and 82.)

(7) The opinion of the United States Circuit Court of Appeals, Tenth Circuit, filed August 20, 1931, (Transcript, Pages 54 to 64, inclusive), together with the decree of said Court entered August 27, 1931. (Transcript, Page 65.)

(8) Complaint. (Transcript, Pages 2 to 5, inclusive.)

(9) Answer. (Transcript, Pages 6 to 10, inclusive.)

[fols. 91 & 92] (10) Statement of evidence. (Transcript, Pages 22 to 46, inclusive.)

(11) Decree. (Transcript, Page 21.)

(12) Certificate of the Clerk of the United States Circuit Court of Appeals, Tenth Circuit. (Transcript, Page 85.)

(13) Statement of points to be relied upon by appellant.

(14) This stipulation.

Dated this the 12th day of October, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant. Rainey, Flynn, Green & Anderson, of Counsel. George M. Nicholson, Thos. H. Owen, N. A. Looney, Counsel for Appellee.

[fol. 93] [File endorsement omitted.]

Endorsed on cover: File No. 36,277. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 463. New State Ice Company, appellant, vs. Ernest A. Liebmann. Filed October 15, 1931. File No. 36,277.